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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 244

WILLIAM C. DENNICK, Administrator of the Estate of Jeannette E. Dennick, Deceased,

Appellant,

vs.

THE MIAMI SAVINGS AND LOAN COMPANY, a Corporation.

APPEAL FROM THE SUPREME COURT OF OHIO.

I—Nature of Case and Statutory Provisions Sustaining Jurisdiction.

This is an appeal under Section 344 (a) of Title 28 of the United States Code, from a final judgment of the Supreme Court of Ohio, entered the 24th day of May, 1944.

The facts from which the appeal arises may be briefly stated, as follows:

The Appellee, a Building and Loan Company, is being liquidated under the laws of Ohio, and the Plaintiff herein presented his claim for allowance and it was all allowed except $2,314.09, and this suit is for the allowance of the $2,314.09.

Plaintiff filed a Petition in the Common Pleas Court of Montgomery County, Ohio, wherein he alleged that $7,507.31 was owing to him from the Defendant on April 18, 1933, the date upon which the Defendant commenced to liquidate under the supervision of the State of Ohio, and that his claim for a portion thereof was allowed and the balance rejected. It was alleged that $7,507.31 was due on that date by reason of the fact that the Defendant purchased the assets of the Buckeye Building and Loan Association of Dayton, and as part of the purchase price agreed to pay each stockholder of the Buckeye Building and Loan Association the face value of his stock, and that the Plaintiff was a stockholder in the Buckeye Building and Loan Association.

The Defendant filed ~~a Reply~~ AN ANSWER and admitted that it owed the Plaintiff $7,507.31 on April 18, 1933, by virtue of that contract and admitted the other essential allegations of the Petition.

As an affirmative defense, the Defendant alleged that it also owed 1,400 other former Buckeye Building and Loan Association stockholders various amounts by virtue of said contract, and among them was a stockholder named Clement D. Smith.

It is alleged that said Clement D. Smith brought suit against this Defendant for the allowance of his claim and in that suit also asked the Court to allow the Dennick claim, and that the Court in said case not only allowed the Clement D. Smith claim, but also allowed some of the other claims including the Dennick claim and ordered this Defendant to give each creditor a Certificate of Indebtedness for 85% of his respective claim and to give Clement D. Smith's lawyers a Certificate of Indebtedness for the other 15% of each creditor's claim, for their services, and that in con-

formity therewith, the Defendant gave $2,314.09 of Dennick's claim to Clement D. Smith's lawyers.

The Defendant herein claimed that the adjudication between it and Smith and Smith's attorneys was binding upon Dennick, the Plaintiff herein, because there were numerous people with separate individual causes of action which arose out of the same facts, and that, therefore, Clement D. Smith did, and had a right to litigate with this Defendant as to how much it owed Dennick, and how much of Dennick's claim or cause of action should be transferred to Clement D. Smith's lawyers. Smith's lawyers had Dennick's claim allowed for $15,427.31 and $2,314.09 is 15% thereof. By virtue of a set-off, which Smith's attorneys didn't know about, this Defendant only owed Dennick $7,567.31, and this Defendant gave this Plaintiff Certificates of Indebtedness for $5,193.22, and gave Smith's attorneys the other $2,314.09.

Defendant alleged that the Court of Common Pleas in that case had jurisdiction to render such a judgment, depriving this Plaintiff of $2,314.09, of his cause of action, but did not specify what Section of the Code of Ohio gave such jurisdiction. Courts take judicial notice of Code Sections.

Plaintiff, for his Reply, denied that said Court had jurisdiction of either him or his said property in said case, and alleged that he was not a party to said suit and that no summons was served on this Plaintiff and that "insofar as this Plaintiff was concerned that entire proceeding and each part thereof is and was void and an atttempt to and a taking of this Plaintiff's property without due process of law and contrary to the 14th Amendment to the Constitution of the United States of America."

Defendant then filed a Motion for Judgment on the Pleadings and the Common Pleas Court sustained said Motion

and rendered final judgment for the Defendant. The Court took judicial cognizance of the decision in *Smith* v. *Kroeger*, Supt., 138 O. S. 508, which holds that Sec. 11257 of the General Code of Ohio ~~has~~ GIVES jurisdiction to render such a judgment under such circumstances.

Plaintiff appealed to the Court of Appeals of Montgomery County, Ohio, and that Court affirmed that judgment for the reasons set forth in the case of *Clement D. Smith* v. *The Miami Savings & Loan Company*, 138 O. S. 508, wherein the Supreme Court of Ohio says that one of numerous creditors with similar separate individual claims has the right to adjudicate the separate individual causes of action of each of said creditors under and by virtue of Section 11257, General Code of Ohio.

The Plaintiff duly appealed to the Supreme Court of Ohio and also duly filed a Motion therein, asking the Supreme Court of Ohio to order said Court of Appeals to certify its record. That appeal was dismissed on the ground that no debatable constitutional question was involved, and the Motion to certify the Record was overruled. An Application for a Rehearing was duly filed and denied on June 7, 1944, and final judgment rendered herein.

II—State Statute, the Validity of Which Is Involved.

There was drawn in question in this case, the validity under the Fourteenth Amendment to the Constitution of the United States, of Section 11257, General Code of Ohio, as applied herein, which is set out in full below. The Section number is that being used in the General Code of Ohio.

> "Section 11257—When the question is of common or general interest of many persons, or the parties are very numerous and (it) is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all."

The Court of Appeals of Montgomery County, Ohio, based its decision on the Supreme Court Decision in *Smith* v. *Kroeger,* 138 O. S., 508 wherein this Section was interpreted and applied. The Supreme Court of Ohio refused to review the Court of Appeals Decision.

The Supreme Court of Ohio, in the case of *Haggerty* v. *Squire, Supt. of Banks,* 137 O. S., 207, and in the case of *Smith* v. *Kroeger, Supt.,* 138 O. S., 508-512, construed this Section to mean:

> "Where a number of persons have separate and individual claims and rights of action against the same party, but all such claims arise from a common source and represent a like interest, the whole matter may be litigated in a single action brought by all of the claimants as co-plaintiffs, or in case the parties are numerous, making it impracticable to bring them all before the Court, by one or more of them suing for himself or themselves and on behalf of the other claimants."

The Supreme Court of Ohio interpreted that to mean that one of numerous claimants who had similar, separate and individual claims and rights of action, but not any common or united interest, might litigate the individual and separate claims of the other persons without their authority and without making them parties to the suit or serving summons on them, and then might have the Court grant the Plaintiff's attorney a percentage of each of the separate judgments without any litigation or agreement between said attorney and the respective individuals, and that each of said claimants would be bound by said judgment and Orders with no right to prosecute his own claim or defend as against the final judment which deprives him of a percentage of his claim, and no right to hire his own attorney or have anything to say about how much he should pay the attorney, and such final judgment would be *res*

judicata as to those matters as between each creditor and that debtor.

The foregoing Section as thus construed, interpreted and applied in this case is believed to conflict with Section One of the Fourteenth Amendment to the Constitution of the United States.

III—Dates of Judgment and Appeal.

The final judgment of the Supreme Court of Ohio, dismissing this Appellant's appeal on the ground that no debatable Constitutional Question was involved, plainly sustained the Constitutionality under the Fourteenth Amendment of the Statute of Ohio referred to above as applied.

This judgment was entered on May 24, 1944. The Petition for appeal to this Court was presented to the Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, on June 14, 1944, and was by him allowed the same day.

IV—Manner in Which Federal Question Was Raised.

The Federal question in this case was raised at the outset and urged throughout all of the proceedings in the State Courts. In Appellant's Reply in the Common Pleas Court he alleged that such taking of this Appellant's property was without due process of law and void as being in conflict with the Fourteenth Amendment to the Constitution of the United States. The Common Pleas Court gets its jurisdiction solely from Statutes, and it takes judicial cognizance of Statutes of the State and of the Decisions construing those Statutes and the Application thereof and of how the Supreme Court interpreted Section 11257 of the General Code of Ohio and has ordered the application thereof, as if fully and completely pleaded.

Such unconstitutionality of said Statute as thus applied was continuously raised thereafter in arguments and Briefs and Notice of Appeal and Application for Rehearing.

Such issue further shows in the Record in the Court of Appeals Decision and in the Decision of the Supreme Court of Ohio dismissing the appeal because there is no debatable constitutional question involved.

V—The Federal Questions Involved Are Substantial.

The issue raised whereby the Appellant's contention that the Ohio Statute here in question, as construed, interpreted and applied in the Supreme Court of Ohio, violates the "due process of law" provision of Section One of the Fourteenth Amendment to the Constitution of the United States, involves the problem of whether one of many creditors having separate and independent causes of action may, without the authority of the other creditors, litigate the other creditors' respective causes of action against the debtor, and whether those creditors who are not parties to said action, and have not been served with any kind of summons or process, will be bound by said judgment, and in addition thereto if after the attorneys for the creditor who brings such a suit, files a Motion in said suit, asking the Court to award them part of each creditor's claim and the Court does award a part of each claim to said attorneys without any litigation between the attorneys and the respective creditors, whether such taking of part of each creditor's claim constitutes depriving him of his property without due process of law.

The Supreme Court of the United States has held in *Hansberry* v. *Lee,* 311 U. S. 32-40 that

> "It is a principle of general application in Anglo-American Jurisprudence that one is not bound by a judgment in personam in litigation in which he is not

designated as a party or to which he has not been made a party by service of process. Pennoyer *v.* Neff, 95 U. S. 714; 1 Freeman on Judgments (5th Ed.) 407."

Section 11257 of the General Code of Ohio would be constitutional if confined to suits wherein the parties were united in interest or had a common interest in the cause of action, but where applied as in this case, it is thus repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Cases Sustaining the Jurisdiction.

The following cases sustain the jurisdiction of the Supreme Court of the United States:

1. Timeliness of Appeal. *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S., 31.

2. All Courts take notice, without pleading, of the public laws and judicial decisions of the State where they are exercising their functions. *Furman* v. *Nichol*, 8 Wall., 44-57.

3. When the United States Supreme Court is reviewing a judgment of a State Court, its judicial knowledge is limited to, and co-extensive with, that of the Court whose judgment it is reviewing. That is, it takes judicial notice of the law of that State. *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158.

4. The jurisdiction of an Ohio Court of Common Pleas is fixed by Statute. *Lemieux* v. *Kountz*, 107 O. S., 84-86.

5. Section 11257 of the General Code of Ohio is the Section which the Supreme Court of Ohio applies and construes as giving the Common Pleas Court authority to deprive this Appellant of his property without notice to him and without him being a party to the suit in which he is deprived of his property. *Smith* v. *Kroeger*, 138 O. S. 508, and the Court of Appeals decision in this case.

6. Making the record show, by the Reply (Pleading), the Decision of the Court of Appeals, the Motion to certify to the Supreme Court of Ohio, and the Briefs in support of the Motion to certify, which are necessarily a part of the Motion to Certify, and in the Application for Rehearing in said Supreme Court, and in the Supreme Court Decision is sufficient, since by express averment and by clear and necessary intendment, the constitutional provision pleaded in the Reply did arise and the Court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, and consequently the jurisdiction of this Court attaches. *Furman* v. *Nichol*, 8 Wall. 44-56.

No particular form of words or phrases is essential. *Bryant* v. *Zimmerman*, 278 U. S. 63-67.

7. Since the purpose of the Reply and "the issue which it presented and sought to have determined were as plainly to be seen, as if the words of the particular constitutional provision relied on had been inserted in it, and the obnoxious legislation spread out at length," that is sufficient to give the Supreme Court of the United States jurisdiction.—*Furman* v. *Nichol*, 8 Wall. 44-57.

8. The Supreme Court of the United States may examine the opinion of the State Court to ascertain whether a Federal question was raised and decided, and whether the Court rested its judgment on an adequate non-federal ground.—*Indiana Ex Rel., Anderson* v. *Brand*, 303 U. S. 95-98-99.

9. If the Plaintiff-Appellant "insisting on the protection of the Constitution," drew in question the validity of State legislation (as was done in this case) "and unless the record discloses that the Supreme Court (of the State) denied relief on other Federal grounds (as was not disclosed in this case) it is perfectly manifest" that the United States Supreme Court has jurisdiction of this cause.—*Furman* v. *Nichol*, 8 Wall. 44-57-58.

10. Jurisdiction to entertain an appeal from the decision of a State Court on the ground that a State

Statute as upheld and applied to a particular transaction is repugnant to the Constitution of the United States. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282.

11. Jurisdiction to entertain an appeal from the decision of a State Court on the ground that a State Statute is repugnant to the Constitution of the United States. *Tumey* v. *Ohio*, 273 U. S. 510.

12. Jurisdiction to entertain an appeal from the decision of a State Court on the ground that a State Statute violates the "due process of law" provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States. *Hansberry* v. *Lee*, U. S. 32-40.

13. If the State Court must give force to a State Statute in order to uphold its judgment, it in effect holds said Statute valid. *Columbia Ry.* v. *South Carolina*, 261 U. S. 336. *Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579-589.

THEREFORE, the Appellant, William C. Dennick, respectfully submits that the Supreme Court of the United States has jurisdiction of this Appeal by virtue of Section 344 (a) of Title 28 of the United States Code.

Respectfully submitted,

CLIFFORD R. CURTNER,
ABRAHAM K. MECK,
Attorneys for William C. Dennick,
Plaintiff-Appellant.

APPENDIX.

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

No. 1779

WILLIAM C. DENNICK, *Administrator of the estate of Jeannette C. Dennick, Deceased, Plaintiff-Appellant,*

vs.

THE MIAMI SAVINGS AND LOAN COMPANY, *a Corporation, Defendant-Appellee;* WILLIAM C. DENNICK, *Substituted, Plaintiff-Appellant.*

Decision.

Rendered February 14, 1944

GEIGER, *J.*

This matter is before this Court on appeal from a judgment of the Common Pleas Court of Montgomery County, Ohio. We will state the issues as briefly as possible, considering the rather complicated situation disclosed.

The Petition recites the appointment of the plaintiff as Administrator and alleges the corporate existence of the defendant and states that on April 18, 1933, the defendant, The Miami Savings and Loan Company proceeded to liquidate its business and since then it has been in the process of liquidation; that prior to May 30, 1930, Jeannette C. Dennick, plaintiff's decedent, was the owner of three certificates in The Buckeye Building and Loan Association, totaling $13,300.00, and the estate of her husband was the owner of one certificate in the same association in the sum of $500.00; that on May 30, 1930, the defendant Association purchased the assets of the Buckeye Building and Loan Association, and as a part of said purchase price, the defendant agreed to pay Jeannette E. Dennick $13,300.00 and to pay the estate of her husband $500.00, but that no part thereof has been paid; that on April 18, 1933, the total amount due on said certificates was $15,427.00 less the

sum of $7920.00 which said parties owed the Association, leaving a net balance on said four certificates of $7507.00; that the defendant was willing to issue to the plaintiff a certificate of indebtedness for the amount due on said four certificates, less $2314.00 which defendant desired to hold until the outcome of a suit between it and C. D. Smith. Plaintiff accepted the offer of a certificate of indebtedness for $475.00 due the estate of her husband and for $12,638.00, the amount plaintiff and defendant erroneously agreed to be the indebtedness due Jeannette C. Dennick, less the part thereof held in abeyance. This error was later corrected and the $12,638.00 certificates of indebtedness was cancelled and a certificate of indebtedness in the sum of $4718.00 was issued, leaving a balance in abeyance of $2314.00.

The law suit with C. D. Smith was determined in 1942, and since said determination, plaintiff has presented his claim to the defendant in the sum of $2314.00 for balance which was thus held in abeyance on the four certificates, and requested defendant to approve it and to issue a certificate of indebtedness therefor, and to pay defendant thereon such amount as has been paid to other certificate holders.

An amended answer was filed by the defendant, admitting certain allegations, and stating that the amount withheld was withheld by order of the court, and for a second defense, it is alleged that in the Smith case, the court determined that the plaintiff's amount as indicated in his petition should be set up and charged on the books of the company in accordance with the decision of the court, and the answer sets out the entry and order of the court and for a further answer the defendant alleges that the decision of the court was reviewed and affirmed by courts of review; that Smith and the plaintiffs were stockholders in the Buckeye Building and Loan Association at the time of the purchase of the assets of the Buckeye. It is asserted that the Court held that said Smith and approximately 1400 other persons, including the plaintiff, constituted a class, and that the relief sought was granted to the individuals constitut-

ing said class. Defendant alleges that all matters set forth in plaintiff's petition have been adjudicated as indicated in the courts of competent jurisdiction. Defendant asks to be dismissed.

As a reply, plaintiff makes certain admissions and asserts that the proceedings in the Smith case were not binding upon this plaintiff, and that the effect of such decision is to take from this plaintiff part of his property without due process of law; that the Court did not have jurisdiction of the plaintiff and his claim; that the attorneys for Smith had plaintiff's claim allowed for more than the amount of plaintiff's claim, and that the court ordered 15% of each creditor's claim taken away from the creditor and given to the attorneys and therefore, the court ordered $2314.00 taken away from plaintiff, whereas this plaintiff only had a claim of $7507.00, 15% of which is $1126.00 and not $2314.00, and this plaintiff has received a certificate for only $4718.00 and the attorneys who were not employed by the plaintiff, and in no way represented him, received a certificate of $2314.00 out of plaintiff's claim of $7507.00; that the entire proceeding was void as to the plaintiff, and an attempt to take his property without due process of law.

On motion two cases were consolidated.

A motion was made orally for judgment on the pleadings, and on April 25, 1943, an entry is filed stating that the cause coming on to be heard before the court upon the motion for judgment on the pleadings, the court considered that the pleadings do not contain a valid cause of action and finds the motion well taken and the court sustains the same and orders that judgment be entered for the defendant and the petition of the plaintiff dismissed.

It does not often occur that we find a single case from which we can arrive at the conclusion as to judgment of the Court below. However, we find the case of Smith, Appellee *vs.* Kroeger, Supt. 138 O. S. 508, has so clearly stated the position of the Supreme Court that we are able to adopt that case as our guide in holding that the Court below was not in error in sustaining the motion for judgment on the pleadings under the date of April 25, 1943. It would be

useless for us to recite the provisions of that case as it must be read in its entirety in connection with the pleadings as we have set them out.

Judgment of the Court below affirmed.

(HORNBECK, *J.* Concurs.)

Appearances:

A. K. MECK, Callahan Bldg., Dayton, Ohio.
Attorney for Plaintiff-Appellant.

MASON DOUGLASS, Callahan Bldg., Dayton, Ohio.
Attorney for Defendant-Appellee.

BARNES, *P. J.*, concurs in the opinion, with a few added facts:

Plaintiff's decedents were original stockholders in the Buckeye Building and Loan Association of Dayton, Ohio. The Miami Savings & Loan Company, of Dayton, Ohio, purchased the assets of the Buckeye. In the written contract of purchase it agreed to pay the stockholders of record the face value of their stock.

The Miami performed this provision of the contract by making a book transaction through which the old Buckeye stockholders were listed as Miami stockholders. A few years later, the Miami was ordered placed in liquidation.

Dr. Smith, as an original holder of stock in the Buckeye which had been transferred for stock in the Miami, brought an action on behalf of himself and all others similarly situated, asking a court of equity to set aside the book transactions listing the stockholders of Miami and declaring that the old Buckeye stockholders be declared creditors by virtue of the original contract and sale of Buckeye assets to the Miami. Smith's contention was sustained by the Common Pleas Court and was affirmed in the Court of Appeals and Supreme Court. Until the action of the Common Pleas Court, the plaintiff's decedents held the position of stockholders of the Miami. Through the judgment in the Smith case plaintiff's decedents had the opportunity of taking advantage of the judgment and becoming creditors. In the same judgment entry, the Common Pleas Court determined that the Smith case was a class suit and

made an allowance of attorney fees payable by all persons who had their status changed from a stockholder to a creditor. It was directed that the Miami issue certificates of claim to all persons entitled thereto with a deduction of 15% from the face value and total of all such deductions was then made the basis for the issuing of a certificate of claim to the attorneys for their services in the class suit. It was only after the plaintiff's decedents availed themselves of the class suit judgment that they had any claim against the Miami. Their position of stockholders was a liability. When the certificates of claim were issued they held valuable assets.

The action of the Court in the instant case was perfectly proper in determining that the Plaintiff as successor of his decedents had no right to have an order giving any relief for the withholding of the 15% at the time the certificate of claim was issued.

The fact that plaintiff's decedents were indebted to the Miami Savings & Loan Company in the sum of $7920.00 would have no bearing whatever on the question of the basis for the 15% calculation. It was perfectly proper that the 15% be deducted from the total amount. Counsel for plaintiff seems to think that the $7920.00 should have been deducted. We cannot agree with this contention. Keeping in mind that plaintiff's decedents have no claim whatever but were stockholders until the time that a court of equity changed their status from that of a stockholder to a creditor. The next question was, creditor for what amount. The amount was the face value of their stockholdings in the Buckeye plus interest. The amount of this claim was subject to attorney's charges for making it available. The net amount would then constitute the claim of the Plaintiff's decedents. In settling the claim it was agreed that plaintiff's obligation to the Miami would be deducted. This was done and certificates of claim issued for the balance.

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 244.

WILLIAM C. DENNICK, ADMINISTRATOR OF THE ESTATE OF JEANNETTE E. DENNICK, DECEASED,

Plaintiff-Appellant,

vs.

THE MIAMI SAVINGS AND LOAN COMPANY, A CORPORATION,

Defendant-Appellee.

PETITION FOR REHEARING.

Now comes William C. Dennick, appellant, and respectfully petitions this Honorable Court for a rehearing herein on the question of whether there is a substantial federal question involved, and as grounds therefor states:

First. This court has been misled as hereinafter stated, into passing upon the wrong question.

Second. The question discussed in Hansberry v. Lee, 311 U. S., 32, 41, 42-3, is not the question involved in this case, nor does the answer to that question solve the question at issue in this case.

Third. This Honorable Court must have been misled by what the Court of Appeals and the Supreme Court of

Ohio said about this being a suit to "Reform books and records", and about "segregating a part of the entire fund".

There is no such remedy known to either law or equity as reformation of a debtor's notation on his books, of the interpretation he places on a contract. Otherwise most legal actions could be converted into equitable actions by merely placing an improper notation on a debtor's books.

Reformation is an equity remedy to make an instrument which creates or conveys a right, express the "intent" of the parties. The contract did express the intent and it was never reformed.

There was no "segregated", "created", or "protected" fund in the Smith case. No such question was involved, notwithstanding the statements of the Ohio courts.

Fourth. The question involved in this case is the same question involved in Hansberry v. Lee, 311 U. S., 32-40, wherein this court said:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in litigation in which he is not designated as a party or to which he has not been made a party by service of process."

This case does not involve an exception to the above rule.

It is true that this court has said on pages 41-42-3 in that case that where a person has been made a party by "representation", under certain circumstances, this court will not interfere.

The Smith v. Kroeger case was not a class suit, and Smith did not represent a class, and consequently this appellant was not a party by representation.

As Pomeroy says, Smith only brought a "bundle of suits" in one suit. Even if the suit had been an equity suit, which it was not, each person would have had the right to leave the Miami's notation on its books as to its claim stand, or bring suit to "reform" it, if he so desired, but Smith had no interest in establishing whether or not Dennick should have the books reformed to show that he was a creditor instead of a stockholder.

Neither did Smith have any interest in establishing the amount of any person's claim except his own. This court on pages 43 and 44 of the Hansberry v. Lee case, points out that in order to be representation, there must not be merely a similar issue but there must be a common or a joint issue.

Tenants of an apartment house may bring a class suit to determine whether the front entrance shall be left unbarracaded, but the tenants have neither a common nor a joint action for breach of their several leases, even if they are identical.

We knew when we filed this case in the Common Pleas Court that we could not win it in the state courts, and knew that we would have to keep the pleadings clear and concise, and the brief and argument intelligent in order to win in this court.

We knew we had a constitutional right to win or lose in this court on the case made out by the pleadings, and evidence if any. There was no evidence and the petition states that by virtue of a contract this plaintiff became a creditor of the defendant, and was such a creditor in the sum of $7,507.31 on April 18, 1933, and remained such creditor to the present time and that was admitted in the answer. There was no allegation in the answer that

plaintiff's legal action was converted into an equitable action to reform by virtue of the defendant making an improper notation on its books.

Nor does the answer say that either Smith or the appellant was entitled to participate in any separate or special fund. They were general creditors, not special creditors.

Wherefore, this appellant prays for a rehearing and a decision on the actual question involved, and says to this Honorable Court that he knew when he commenced this case that he could not win it in the state court on account of the Supreme Court decision in Smith v. Kroeger, and could not succeed in this court unless given an opportunity to brief and argue the same, and has stated clearly in his statement as to jurisdiction the vital issue in this case but thought the issue made by the pleadings would be the issue herein and that a statement thereof, without tearing down the state court's statement, would be sufficient.

Respectfully submitted,

CLIFFORD R. CURTNER,

ABRAHAM K. MECK,

Counsel for Appellant.

CERTIFICATE.

I, Abraham K. Meck, attorney for appellant do certify that in my opinion the foregoing petition for rehearing is well founded and is not presented for the purpose of creating a delay.

ABRAHAM K. MECK.

No. 244. DENNICK, ADMINISTRATOR, *v.* MIAMI SAVINGS & LOAN CO. Appeal from the Supreme Court of Ohio. October 9, 1944. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Hansberry* v. *Lee*, 311 U. S. 32, 41, 42–3, and cases cited. *Mr. Clifford R. Curtner* for appellant. Reported below: 143 Ohio St. 490, 55 N. E. 2d 795.